

STATE BOARD OF EDUCATION

STATE OF GEORGIA

TOMIKA M.,)	
)	
Appellant,)	CASE NO. 1985-34
)	
v.)	
)	
JASPER COUNTY BOARD)	
OF EDUCATION,)	
)	DECISION OF STATE
Appellee.)	HEARING OFFICER

PART I

SUMMARY OF APPEAL

This is an appeal by the mother of Tomika M. (hereinafter "Student") from a decision of a Regional Hearing Officer that the Jasper County School System (hereinafter "Local System") could offer the Student an appropriate educational program in a Day Service Center operated under the regulations of the State Department of Human Resources, if the Local System provided the parent with certain related services necessary to provide an educational benefit to the Student. The mother contends on appeal that the Regional Hearing Officer erred because personnel of the Day Services Center do not meet State Department of Education ("SDE") certification standards, because the Local System failed to meet a requirement of proof of severe financial hardship, because the regulations set forth a priority for the expenditure of funds which classifies the most severely disabled as second priority, and because the Student is not being educated in the least restrictive environment.

PART II

FACTUAL BACKGROUND

The Student is a sixteen year old female with severe physical and mental disorders. She has spastic quadriparesis, scoliosis, a severe visual handicap, language and speech disabilities and severe cognitive disabilities. She is totally dependent on others for feeding, dressing and grooming. Her vocabulary appears to be limited to four or five words and she is not toilet trained. She is able to sit up by herself for a period of time if placed in a sitting position, but she is unable to assume a sitting position by herself. She cannot walk or crawl. The Student was placed in the Putnam-Jasper Training Center around age three or four and remained there until her mother withdrew her in 1979. The Student was kept at home by her mother until 1983, when she was returned to the Training Center. The Training Center is no longer called a training center and is now referred to as the Day Service Center.

On September 28, 1984, the Day Service Center staff developed an Individualized Program Plan ("IPP") for the Student for the 1984-85 school year with representatives of the Local System in attendance. One outcome of this meeting was that the Student was referred by the Georgia Learning Resources System ("GLRS") to the Developmental Services Program at Mercer

University. There, an evaluation was performed and recommendations made concerning services needed by the Student. The recommendations made were that first, medical and hearing evaluations be conducted every six months; second, she be referred to physical and occupational therapists to receive an exercise program with instruction to the family in relaxation techniques, daily living activities, an adaptive wheelchair and transfer equipment; third, she receive speech and language therapy; fourth, special education programs be coordinated with the above professionals; fifth, home assistance programs, if any, should be arranged to assist in home management and therapy strategies; and sixth, that all programming should be increased in intensity. IPP's were again considered on February 13, 1985 and May 22, 1985. At the second meeting, representatives of the parent requested that an Individualized Education Plan ("IEP") form be used in place of the IPP form. That meeting was then adjourned until June 19, 1985. At the June 19, 1985 meeting, the school system representatives and the Day Service Center representatives recommended continued placement in the Day Service Center. The services offered consisted of placement in a self-contained profoundly handicapped class with speech therapy, physical therapy, and special transportation as related services. No teacher certified by the State Department of Education is currently available at the Day Service Center and one has not been provided during the past IPP's. The IEP-IPP

Day Service Center as an appropriate placement in the least restrictive environment and the lack of a finding by the Regional Hearing Officer in favor of the Student regarding a certified teacher. It is the mother's contention with respect to the least restrictive environment that the placement should be within the Local System instead of in the Day Service Center. Her contention with respect to the question of a certified teacher is that the Day Service Center is not an appropriate placement because it fails to meet the standards of the State Board of Education which requires that all teachers be certified.

The mother contends that the Office of Special Education and Rehabilitative Services standards have clarified the phrase "least restrictive environment" and requires the school system to demonstrate by compelling evidence that any removal of the child is only to benefit the child and not for administrative convenience. It is her position that the evidence shows there has never been a class for the severely or profoundly handicapped in the Local System, the Student has never had an IEP, the Student missed three years of her education due to not having been enrolled in the schools, and the Student's mother was not advised of her right to have the Student in school.

Placement in the least restrictive environment is certainly a requirement of P.L. 94-142. However, it is clear that individuals often disagree about what is the least restrictive environment for a student. Thus, hearings such as the one below arise to reach a conclusion on that issue.

The State Hearing Officer, in considering the decision of the Regional Hearing Officer, is bound to affirm that decision if there is substantial evidence to support the Regional Hearing Officer's decision and the decision is consistent with the rules and regulations adopted by the State.

The decision of the Regional Hearing Officer that the placement offered was in the least restrictive environment was supported by substantial evidence. There was ample testimony in the record that the Student would not benefit from exposure to nonhandicapped students. There was testimony which showed that it was unlikely she could see other students and she could not interact with others in more than a minimal fashion. The individuals who testified in favor of the Student's being placed in the school system did evidence a bias which the Regional Hearing Officer was entitled to consider as failing to take into account individual needs of the Student.

There is nothing in State or Federal regulations or the standards of the Office of Special Education and Rehabilitative Services which precludes placement of a student in a restrictive placement such as the Day Service Center. The regulations and the standards specifically recognize that students may need to be removed from the regular education classes. No evidence was presented which showed that the IEP could be met in a less restrictive environment. Placing the Day Service Center under the control of the Local System or on the campus of a school within the system would not make the Student's placement less

restrictive. She still needs direct attention, she cannot function in the regular lunchroom or on the playground with regular students. Thus, this is one of those cases where the Student needs to be removed from the regular school environment and it is not appropriate for her to participate with nonhandicapped children in meals, recesses, and other nonacademic and curricular services.

Thus, the decision of the Regional Hearing Officer with respect to the issue of least restrictive environment is supported by substantial evidence and is not in violation of the regulations. Therefore, that issue does not provide grounds for reversal as argued by the mother.

In addition to the mother's contention that the Student is not being served in the least restrictive environment, the mother has presented two other contentions on appeal which do not provide grounds for reversal of the Regional Hearing Officer's decision. First, she argues that the Local System is not entitled to plead financial inability. This argument appears to be true under the facts presented but, nonetheless, does not provide any grounds for reversal. The Regional Hearing Officer found that the program offered by the Local System was appropriate and his decision excluded the question of cost when he stated it would not be feasible or practicable to require the Local System to provide what would be questionably greater facilities than those provided. Thus, the question of cost was not a factor in the Regional Hearing Officer's decision.

Second, she argues that the Student is a second priority child which is illegal after 1978. Second priority children are defined in the Federal Regulations as severely handicapped children who are receiving an inadequate education. It is true that after 1978 the provision of a free appropriate public education to the Student is required, but the fact of whether a child is second priority is inherent in the issue to be determined in this case as to whether the Student is receiving an appropriate education. If the Student is receiving an appropriate education, then the Student would not be a second priority child. Thus, that issue is duplicative of the issue of whether the Student is receiving an appropriate education.

The mother's final contention on appeal is that the Day Service Center is not appropriate because it fails to meet the standards of the state educational agency. She cites 34 CFR §300.4(b) which requires that special education and related services must be provided which meet the standards of the State educational agency. She contends that because the Day Service Center employees are not certified, the Day Service Center does not meet this requirement.

The State Department of Education has set forth standards for local school systems which require that all professional personnel employed in the local systems hold valid certificates and that all auxiliary personnel (aides and paraprofessionals) hold valid licenses. Standards for Georgia Public Schools, 1985, Standard 21 and Standard 23. These certificates and

licenses are required to be issued by the State Board of Education (O.C.G.A. §20-2-282). While these standards were not introduced at the hearing below, and therefore were not considered by the Regional Hearing Officer, the State Hearing Officer is of the opinion he may take judicial notice of the standards of the State Board of Education. The fact that the State Hearing Officer is acting as a hearing officer for the State Board should require the State Hearing Officer to take notice of the rules and regulations issued by that Board.

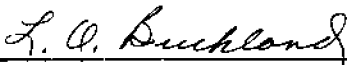
Because the Day Service Center personnel are not certified or licensed by the State Department of Education, the program offered to the student does not meet the standards of the State Educational Agency and, therefore, does not comply with 34 C.F.R. §300.4. In order for the placement to comply with that requirement, the Local System must provide for implementation of the student's IEP by a certified teacher and services from aides and paraprofessionals to be provided by individuals who are licensed to provide those services. A certified teacher may not need to be present in the service center at all times if the teacher determines that the program can be implemented by licensed aides. How the program is implemented is an instructional decision which needs to be made by the teacher.

PART IV

DECISION

Based upon the foregoing discussion, the record presented, and the briefs and arguments of counsel, the State Hearing Officer is of the opinion that the decision of the Regional Hearing Officer that the Local System had offered the Student an appropriate placement is not consistent with the regulation requiring that the Student be provided an education which meets the standards of the State educational agency because the State Board of Education standards require that teachers be certified and auxiliary personnel be licensed. The decision of the Regional Hearing Officer is, therefore,

REVERSED.



L. O. BUCKLAND
STATE HEARING OFFICER
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